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No. 90-1352

In the Supreme Court of the United States

OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, (MABA), ET AL., APPELLANTS

v.

THE STATE OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

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The State of Texas, as appellee, suggests that the appeal should be dismissed because appellants lack standing (Br. 12-15) and that, in any event, the United States should be dismissed (*id.* at 10-12). The State's submission is premised on misapprehensions regarding the procedural posture of this case and the status of appellants and of the United States. The State's suggestions that the appeal be dismissed, and that the United States be dismissed, should be rejected.

1. The State's contention that the Mexican American Bar Association (MABA) "is the only appellant among the private plaintiffs" (Br. 12) is incorrect. We believe that private plaintiffs' notice of appeal is effective as to all the private plaintiffs, and that

Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), cited by the State (Br. 13), is distinguishable.[1] Here, unlike in *Torres*, it is clear that all private plaintiffs sought to appeal. That intention is manifested by the names of all counsel for the private plaintiffs on the notice of appeal, and by the description of "Mexican American Bar Association (MABA) et al." as the "Plaintiffs-Appellants" taking the appeal. J.A. 95.[2] By contrast, in *Torres*, the notice of appeal used the term "et al." but also listed 15 of the 16 plaintiffs. In those circumstances, the use of "et al." could have reasonably been read to apply to all of the named plaintiffs, but not to the one plaintiff specifically omitted. In addition, since private plaintiffs seek declaratory and injunctive relief with respect to the State's failure to obtain preclearance of legislation in violation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, their claims, unlike those in *Torres*, are undifferentiated and the dis-

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[1] In *Torres*, plaintiffs were intervenors in an employment discrimination case. Their notice of appeal of the district court's judgment inadvertently listed the names of only 15 of the 16 plaintiffs. 487 U.S. at 313, 317. The Court held that Fed. R. App. P. 3(c), which states that a notice of appeal "shall specify the party or parties taking the appeal," is jurisdictional and that the failure to name a party in the notice of appeal "constitutes a failure of that party to appeal." 487 U.S. at 314.

Although the instant case involves an appeal to the Supreme Court, and not to a court of appeals, the Supreme Court Rules contain a provision substantially identical to the Federal Rule of Appellate Procedure at issue in *Torres*. See Sup. Ct. R. 18.1 (in a direct appeal from the district court, "[t]he notice of appeal shall specify the parties taking the appeal").

[2] MABA is the first plaintiff listed in the private plaintiffs' complaint. See MABA Complaint para. 3.

trict court's adverse decision is indivisible.[3] In these circumstances, reference to the "Plaintiffs-Appellants" and the use of "et al." should be effective as to all private plaintiffs. All of the private plaintiffs will be equally affected by a favorable or unfavorable decision on appeal, and thus the concern in *Torres* that the appellee and the court have notice of which plaintiffs will be bound by an adverse judgment (487 U.S. at 317-318) is not present here. Similarly, since the sole issues in the appeal are whether the State's 1989 legislation was precleared by operation of law and whether the Travis County judgeships required preclearance, the notice of appeal affords the State full notice of the consequences of a decision favorable to appellants.[4]

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[3] Private plaintiffs include MABA, three other associations, and 13 individuals who are registered voters in various counties in Texas. See MABA Complaint paras. 3-18. The notice of appeal explicitly refers to one of the private plaintiffs. See J.S. App. 96 (notice of appeal signed by "Attorney for Christina Moreno"). We note, however, that Ms. Moreno is identified in the complaint as "qualified to vote for district judges in Midland County" (MABA Complaint para. 6), and the judgeships at issue are in Dallas, Lubbock, Tarrant, and Victoria Counties (with respect to the 1989 legislation) and in Travis County. Cf. note 4, *infra*.

[4] See generally *National Center for Immigrants' Rights, Inc.* v. *INS*, 892 F.2d 814, 816 (9th Cir. 1989) (regarding appellate jurisdiction and notice of appeal), decided on the merits, 913 F.2d 1350 (9th Cir. 1990), cert. granted, No. 90-1090 (Apr. 1, 1991). But see, *e.g.*, *Minority Employees of the Tennessee Dep't of Employment Security, Inc.* v. *Tennessee Dep't of Employment Security*, 901 F.2d 1327 (6th Cir.) (en banc), cert. denied, 111 S. Ct. 210 (1990).

Because the notice of appeal is effective as to all private plaintiffs and because at least some of the private plaintiffs unquestionably have standing (*e.g.*, Joan Ervin (para. 8),

2. With respect to the status of the United States, the State is similarly incorrect. The State begins by attacking a straw man. The State maintains that the United States is not an appellant. Br. 10. We agree, and we have not contended to the contrary. As we explained in our brief (at 9-10), we did not file our own jurisdictional statement because we had not raised in the district court an issue of overriding significance to one of the questions presented—the nonreviewability of the Attorney General's discretionary determination that submission of additional information materially supplements a jurisdiction's original submission and thereby recommences the Attorney General's 60-day review period.[5] Instead, we filed as an appellee in support of appellants. See Sup. Ct. R. 18.2 ("All parties to the proceeding in the district court shall be deemed parties to the appeal.").[6] The State's reliance (Br. 10-11) on *Diamond* v. *Charles*, 476 U.S. 54 (1986), is therefore also misplaced. Indeed, *Diamond* supports our status as an appellee because it confirms the settled rule of this Court that "a party below * * * remains a party here." *Id.* at 63.

3. The State further suggests that the United States should be dismissed as a party because the

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Volma Overton (para. 11), Mary Ellen Hicks (para. 17)), it is not necessary for this Court to consider whether MABA itself also has standing. See *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986).

[5] Although the State speculates about possible ulterior motivations for our decision not to file a jurisdictional statement (Br. 10 n.4), these speculations are unfounded and incorrect. As noted, our brief forthrightly states our reason for not filing a jurisdictional statement. See Gov't Br. 9-10.

[6] With respect to one part of one issue, we disagree with appellants. See Gov't Br. 22-23.

United States' complaint and the appellants' complaint were consolidated below, and thus, according to the State, the United States is not a party in appellants' appeal of the district court's judgment. State Br. 11-12. This suggestion is erroneous. This Court's Rules provide that "[a]ll parties *to the proceeding in the district court* shall be deemed parties to the appeal." Sup. Ct. R. 18.2 (emphasis added).[7] There can be no question that the United States was a "part[y] to the proceeding in the district court." The district court consolidated the two actions; held a single hearing, with all parties fully participating; issued a single decision; and *issued a single judgment.* See J.S. App. 1, 41, 93; Gov't Br. 7-9 & 10 n.13.[8] The State's suggestion that the United States may not be considered a "part[y] to the proceeding in the district court"—even though the very judgment that binds the United States is at issue in the appeal—is thus clearly mistaken.[9] Indeed, in the

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[7] See also Sup. Ct. Rule 12.4 (on petition for a writ of certiorari, "[a]ll parties *to the proceeding* in the court whose judgment is sought to be reviewed shall be deemed parties in this Court.") (emphasis added).

[8] The fact that only a single judgment was issued makes it especially clear that the United States is a party. This Court's Rules envision that parties to a single judgment are parties to an appeal of that judgment. See Sup. Ct. R. 18.2 (parties interested jointly, severally, or otherwise in *the judgment* may appeal separately; or any two or more may join in an appeal") (emphasis added).

[9] The State seeks to rely (Br. 11-12) on a supposed general rule about the effects of consolidation. The authorities cited by the State, however, do not involve a construction of this Court's Rules (and the procedural context presented by an appeal to this Court from a single judgment in consolidated cases). Compare Sup. Ct. R. 18.2 (parties to the proceeding

Voting Rights Act context itself, the United States has previously participated in this Court, as an appellee in support of appellants, in an appeal by private appellants from a single district court judgment concerning consolidated cases. See Brief of the United States, *Blanding* v. *DuBose*, No. 81-325 at 2 n.2; *Blanding* v. *DuBose*, 454 U.S. 393 (1982). See also *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 266 n.2 (1984) ("Two other taxpayers * * * were appellants in the consolidated suit in the Hawaii Supreme Court. They did not appeal to this Court and thus are appellees here pursuant to [the predecessor to Rule 18.2].").

Accordingly, the State's motion to dismiss the appeal and to dismiss the United States should be denied.[10]

Respectfully submitted,

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Solicitor General

MAY 1991

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in the district court are parties to the appeal in this Court) with *Torres* v. *Oakland Scavenger Co.*, *supra* (under Federal Rules of Appellate Procedure, party who did not prevail in the district court is not a party in the court of appeals unless that party is included in a notice of appeal).

[10] We agree with the State that the four "nascent Tarrant County judgeships" are not before this Court (see State Br. 12), although not for all of the reasons that the State suggests. Those judgeships are not before the court because appellants did not challenge them. Indeed, even though the United States did challenge those judgeships, the district court apparently believed that those judgeships were not before it because "the statutory conditions necessary to bring them into existence have not been met." J.S. App. 7 n.1.

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